Legal Backgrounder

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 23 No. 39 September 19, 2008

STATE ATTORNEYS GENERAL MUST BE MINDFUL OF SEPARATION OF POWERS

by

The Honorable John Suthers and Geoff Blue

The traditional role of state attorneys general in protecting their constituents from economic and environmental hazards was to enforce the civil and criminal laws passed by their respective state legislatures, to contest federal positions they deemed contrary to states' rights and principles of federalism, and to competently represent the state officials and agencies that are their clients. As to litigation, the only proper consideration for attorneys general was whether the law had been violated and whether there was sufficient evidence to prove it in court.

But it is apparent that some state attorneys general have found this job description too limiting. Encouraged by various interest groups, several state attorneys general have come to view their role as including litigation for the purpose of affecting public policy change. This development is a threat to the separation of governmental powers and has the potential to seriously undermine free enterprise.

Understandably, the increased litigiousness of state attorneys general, aimed most frequently at corporate America, has led to increased lobbying of the attorneys general by the potential defendants as well as interested groups that might benefit from the litigation. Instead of seeking the attorneys general's vote, the lobbyists are hoping to persuade the attorneys general to sign or not to sign on to an *amicus curiae* brief in the federal appellate courts, or, more importantly, to convince the attorneys general to initiate or to join, or to refrain from initiating or joining, a lawsuit. The lobbyists spend a great deal of time educating attorneys general about various issues that may become fodder for litigation in the future, and corporations, interest groups and plaintiffs' law firms are now investing millions of dollars in attorney general races in the various states in an attempt to protect their interests.

How did it come to this? Fifteen years ago, no one cared much about state attorney general races. Highly compensated lobbyists did not hang around attorneys general meetings. It appears the current situation is a confluence of interrelated trends: attorneys general have become more litigious, more high-profile, and more politically ambitious.

There is no question but that state attorneys general have become much more aggressive in pursuing what they believe to be the public interest and that consumer and environmental protection litigation is the clearest manifestation of this fact. Multistate actions involving numerous states against an offending company are now

---

The Honorable John Suthers is the Attorney General of the State of Colorado. **Geoff Blue** is Colorado's Deputy Attorney General for Legal Policy. General Suthers is the author of the recently published book *No Higher Calling, No Greater Responsibility: A Prosecutor Makes His Case*.

commonplace, and some attorneys general are not the least bit shy about taking on corporations or industries on rather novel, and oftentimes questionable, legal theories.

The aggressive litigation pursued by state attorneys general has brought them a much higher public profile. The mainstream media has generally reported the attorney general activity favorably, and many attorneys general have assumed a populist image that plays well with voters.

State attorneys general are now routinely running for higher office, including governor or U.S. senator. In fact, political insiders now often joke that AG means "almost governor" and NAAG (the National Association of Attorneys General) is really the "National Association of Aspiring Governors." That reality, in turn, has attracted more lawyers who have primarily a political background, rather than a legal background, to run for the office.

The result of the confluence of these three trends is an increase in a phenomenon many knowledgeable observers refer to as attorney general "activism." At its essence, attorney general "activism" is when a state attorney general attempts to remedy a real or perceived problem through means other than that contemplated by legislative bodies. A few vivid examples will help explain attorney general activism more clearly.

In the aftermath of Hurricane Katrina in 2005, gas prices rose sharply. [1] The public was angry, believing that the rise in price was more the result of corporate opportunism than market forces. Many state attorneys general, wanting to be perceived as diligent problem solvers, weighed in with their concerns. The Federal Trade Commission (FTC) and several attorneys general initiated investigations.[2] The FTC found no systematic wrongdoing, concluding that the rise in prices was attributable to market forces, including the highly volatile spot and futures markets.[3] Various AG investigations reported similar conclusions.[4] In a national phone conference to discuss the investigations' findings, a veteran attorney general from the Midwest interjected and made an amazing assertion: "Just because we haven't found anything illegal, doesn't make it right and doesn't mean we shouldn't do anything about it," he said. "We need to do something about these obscene profits." That is the mindset of an activist attorney general.

Similarly, former New York Attorney General Eliot Spitzer was an incredibly aggressive attorney general, who took on the New York Stock Exchange, a nongovernmental entity, for paying its CEO too much. The majority of the claims in this case were dismissed because Attorney General Spitzer had overreached his authority: "In short, the authority to bring suit in what the Attorney General perceives to be the interest of the state cannot trump contrary determinations about the public interest made by the Legislature…."[5]

---

[1] FEDERAL TRADE COMMISSION, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES (2006), *available at* http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf, Executive Summary p. i.

[2] *See generally, id. See also, e.g.*, CONSUMER PROTECTION UNIT CIVIL LITIGATION DIVISION, STATE OF IDAHO OFFICE OF THE ATTORNEY GENERAL, REPORT ON POST-HURRICANE KATRINA GASOLINE PRICES IN IDAHO, *available at* http://www2state.id.us/ag/newrel/2006/gasreport2006.pdf; CALIFORNIA STATE ATTORNEY GENERAL BILL LOCKYEAR, REPORT ON GASOLINE PRICING IN CALIFORNIA, UPDATE MARCH 2004, *available at* http://ag.ca.gov/antitrust/gasoline/pdf/gasoline.pdf; STATEMENT FROM THE OFFICE OF THE ILLINOIS ATTORNEY GENERAL LISA MADIGAN, RISE IN GAS PRICES INVESTIGATED IN WAKE OF HURRICANE KATRINA, *available at* http://www.illinoisattorneygeneral.gov/consumers/gas_prices.html#more_info.

[3] *See* FEDERAL TRADE COMMISSION, *supra* note 1, Executive Summary, p. viii.

[4] CONSUMER PROTECTION UNIT CIVIL LITIGATION DIVISION, *supra* note 2, at 50-51; CALIFORNIA STATE ATTORNEY GENERAL BILL LOCKYEAR, *supra* note 2, at 2-3; STATEMENT FROM THE OFFICE OF THE ILLINOIS ATTORNEY GENERAL LISA MADIGAN, *supra* note 2, at paras. 2-3.

[5] *People v. Grasso*, 2007 NY Slip Op 03990, *12, 42 AD3d 126, 142 (N.Y. App. Div., May 8, 2007). The remaining claims against Grasso were dismissed on July 2, 2008, because they relied upon the New York Stock Exchange's status as a non-profit entity, and that status had changed when the exchange had merged with and been succeeded by a for-profit entity. *People v. Grasso*, 2008 NY Slip Op 05970 (N.Y. App. Div., July 2, 2008).

Bill Lockyer, the former attorney general of California, sued the world's major auto manufacturers in the last few months before he left office.[6] He wanted California to recover damages for all the purported environmental harm caused by automobiles since their invention. It was his contention that vehicles are a "public nuisance" the manufacturers have inflicted upon us. Not only is public nuisance a novel theory for a suit of this nature, but the case ignored the fact that the California legislature has imposed upon the auto manufacturers auto emission standards that are much stricter than the rest of the nation, and the companies have complied by specially manufacturing a significant portion of their fleets for sale in California. The suit also didn't acknowledge that it wasn't the auto manufacturers that built all the freeways on which the cars are driven. California's suit was summarily dismissed by a federal court as non-justiciable.[7] The assistant attorney general in charge of it complained about the dismissal, proclaiming that if there is a problem, "[T]here needs to be a remedy for it."[8]

Attorney General Spitzer and seven other attorneys general also sued five of the nation's largest public utilities, seeking a reduction in carbon emissions, even though none of the utilities were located in their states.[9] This case was ultimately dismissed because it raised non-justiciable political questions.[10] Current New York Attorney General Andrew Cuomo has taken steps to deter the construction of power plants in Kansas and Colorado.[11] It seems state boundaries are no longer much of a deterrent to the reach of state attorneys general. Basic tenets of federalism are jeopardized by the notion that one state can control the actions of another.

Despite the lack of a coherent legal theory on which to base their lawsuits, attorneys general are oftentimes able to extract settlements from the companies before a suit is filed. Why do the companies settle? They settle because publicly-held companies threatened with a lawsuit by state attorneys general can rarely afford to fight it out in court. While they typically have sufficient profits and plenty of high-quality lawyers to fight the lawsuit, they also have an obligation to their shareholders to act in the shareholders' best interests. In most situations of this nature, a series of bad headlines in the *Wall Street Journal* or the *New York Times* about state attorneys general suing a corporation will have a more significant adverse impact on the market capitalization (i.e., stock price) of the company than any potential verdict five or ten years down the road. The incentive to settle and avoid the bad headlines is very strong if the "price" to be paid isn't too large. The corporations know it, and the attorneys general know it.

Such an aggressive litigation posture by attorneys general has led critics to question whether they're engaged in a violation of the separation of powers. By using litigation to achieve public policy objectives they deem desirable, they are, in essence, legislating and regulating by litigation. They are shaping public policy, which is traditionally the legislative function. But the consent decrees by which they resolve the litigation and secure policy changes are not subject to either legislative or executive approval.

It is wholly appropriate for attorneys general to weigh in to the legislature or the voters on policy issues related to their statutory or constitutional jurisdiction. Attorneys general should also propose legislation related to crime, consumer protection, and other matters that are relevant to the work of their offices. But when it comes to litigation, the only appropriate consideration should be whether the law has been violated and whether there's sufficient evidence to prove it in court. It is not appropriate for attorneys general to pursue litigation that doesn't derive from constitutional or statutory authority, but rather represents the attorney general's personal view of what constitutes the public interest. Some of the litigation that state attorneys general are currently pursuing

---

[6]Complaint, *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (No. C06-05755 MJJ).

[7]*California v. General Motors Corp.*, Slip Op., 2007 WL 2726871, *16 (N.D. Cal., Sept. 17, 2007).

[8]"Calif. suit on car greenhouse gases dismissed," Reuters, Monday, Sept. 17, 2007.

[9]*Connecticut v. American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005)

[10]*Id. at 274.*

[11]Felicity Barringer and Danny Hakim, *New York Subpoenas 5 Energy Companies*, N.Y. TIMES, Sept. 16, 2007, N.Y. / Region Section.

constitutes a dramatic circumvention of the legislative function in a manner that the governor or other executive officer could never accomplish. For example, if California's automobile emission standards are deemed insufficient to protect the public, isn't it up to the California legislature to act? Why should that decision lie with the California attorney general?

The *Wall Street Journal*, the U.S. Chamber of Commerce, the American Enterprise Institute, the Competitive Enterprise Institute, the Washington Legal Foundation, and many other organizations interested in protecting free enterprise in the Unites States are leading the debate on the issue of "activism" of state attorneys general.[12] There are several proposed solutions, many of which are not realistic. For instance, some have proposed eliminating multistate actions by attorneys general. However, state attorneys general have been involved in multistate actions since 1907 when they took on the Standard Oil Trust. Even if multiple states filed independent actions against a company or companies in federal court, it may well be determined, and correctly so, that consolidation of the actions in a single case is the most efficient way to handle the litigation. For example, pharmaceutical companies whose patents were expiring gave financial incentives to potential generic competitors to stay out of the market for a few extra years. I see that as a clear violation of the antitrust laws of every state and a proper subject for multi-state litigation.[13] A multi-state settlement oftentimes is the most efficient and cost-effective means to resolve these cases.

The most effective method of deterring attorney general activism is by concentrating on curtailing some of the means by which attorneys general have expanded their influence. That will typically involve statutory changes. Legislatures can limit the powers given to the attorney general under state consumer protection laws. Some state consumer protection laws are dramatically broader in scope than others. And legislatures can limit the ability of the attorney general to transfer the police power of the state to private lawyers. Some of the most significant, and egregious, examples of regulation or policy making through litigation have come about when attorneys general hired private law firms to pursue litigation on a contingency fee basis. Several states have restricted the circumstances or the terms upon which that can be done.[14] The state police power should only be exercised by a neutral public official who is not financially vested in the outcome, and such neutrality typically is lost when cases are shopped to contingency fee lawyers.

Commerce in America relies on the predictability that comes with the rule of law. Attorney general activism undermines the rule of law by substituting the attorney generals' public policy preferences for the public policy set by the legislatures. Such activism can subject defendants to liability for actions they reasonably believed were legal when taken. This result undermines the rule of law, weakens our market system, and is patently unfair. It also removes the policy-making authority from the people and their elected legislatures, who are uniquely structured to balance the competing interests in developing public policy. Hopefully, the debate about state attorney general activism will move beyond *Wall Street Journal* editorials and free enterprise think tanks and into greater public consciousness. Attorney general candidates need to be questioned about their views on the matter, and the press needs to report those views to the people. There is a lot at stake.

---

[12] *See, e.g., Paint by Lawyer*, Wall Street Journal, November 6, 2005, at http://online.wsj.com/article/SB113131932397589558-search.html?KEYWORDS=Paint+by+Lawyer&COLLECTION=wsjie/archive; Michael S. Greve, *Government by Indictment, Attorneys General and their False Federalism*, American Enterprise Institute, May 24, 2005, at http://www.aei.org/publications/pubID.22565/pub_detail.asp.

[13] *See, e.g., State of Colorado v. Warner Chilcott, et al.*, Civ. Action No. 05-2182 (CKK) (D.D.C. 2005).

[14] *See, e.g.*, COLO. REV. STAT. § 13-17-304.